

AGENDA  
ADVISORY COMMITTEE  
ON MODEL CIVIL JURY INSTRUCTIONS

Administrative Office of the Courts  
Scott M. Matheson Courthouse  
450 South State Street  
Council Room, Suite N31

June 14, 2004  
4:00 to 6:00 p.m.

Welcome and approval of minutes	John Young
Preliminary and General Instructions	Phil Ferguson, Ch.
Negligence Instructions	Frank Carney, Ch.

**Meeting Schedule: Matheson Courthouse, 4:00 to 6:00, Judicial Council Room**

July 12  
August 9  
September 13  
October 18 (3<sup>rd</sup> Wednesday)  
November 8  
December 13

## *MINUTES*

Advisory Committee on Model Civil Jury Instructions

May 10, 2004

4:15 p.m.

Present: John L. Young (chair), Timothy M. Shea, Honorable William W. Barrett, Jr., Paul M. Belnap, Francis J. Carney, Phillip S. Ferguson, L. Rich Humpherys, Colin P. King, Paul M. Simmons

Excused: Ralph L. Dewsnup

1. *Minutes.* The board approved the minutes of the April 12, 2004, meeting.

2. *Law Clerk.* Mr. Carney reported that the Litigation Section of the Bar has committed up to \$5,000 for a law clerk to help the committee with research. Mr. Carney placed an ad last week at the S.J. Quinney College of Law for a part-time clerk, to work 15 to 20 hours a month for \$20 an hour. He would like to hire someone in the next two weeks. So far he has had only one response to the ad.

3. *New Committee Members.* Mr. Young reported that he has written to Chief Justice Durham recommending that Steve Nebeker and Dave West be added to the committee.

4. *Draft Preliminary and General Instructions.* The committee continued its review of the draft instructions prepared by Mr. Ferguson's subcommittee. Mr. Ferguson reported that he had incorporated the changes discussed at the last committee meeting. The committee reviewed the following instructions:

a. *1.4. Evidence in the Case.* At Mr. Carney's suggestion, the sentence "Do not look things up on the internet" was added.

b. *1.9. Credibility [or Believability] of Witness Testimony.* Mr. Humpherys expressed concern that the instruction as written could be interpreted to require the jury to disregard the testimony of a witness who had a personal interest in the case or a bias. The instruction was revised to address this concern.

c. *2.9. Credibility [or Believability] of Witness Testimony.* The committee discussed whether this instruction (which duplicates 1.9) should be given again at the end of trial. Mr. Shea suggested that, in the interest of space, we not repeat instructions. Mr. Young suggested that the instructions to the court and counsel could suggest that the court may want to repeat some of the preliminary instructions at the conclusion of the case and could even suggest preliminary instructions that the court might consider repeating. Mr. Shea and Judge Barrett noted that the jury should receive at least one written copy of all instructions, regardless of when they are given in the case.

d. *2.10. Inconsistent Statements.* The committee simplified the instruction to make it more understandable.

e. *2.11. Effect of Willfully False Testimony.* Mr. Humpherys noted that, as written, the instruction allowed the jury to believe testimony it found to be willfully false. The instruction was revised to eliminate this problem and to simplify the instruction.

f. *2.13. Statement of Opinion.* The subcommittee had combined the old MUJI instructions on lay opinion testimony and expert testimony into one instruction. Mr. Humpherys questioned whether the jury needs to be instructed on the standards for admissibility of opinion testimony. He further suggested that, even if one or more instructions on expert testimony are desirable, the jury does not need to be instructed on lay opinion testimony, which is adequately covered by instruction 1.9. Mr. Carney thought that the jury needed to be instructed on expert testimony but asked what the law is on expert testimony; specifically, Is the jury required to accept uncontroverted expert testimony? If so, can a party controvert expert testimony by cross-examination alone, or must the party produce contrary expert testimony? Some committee members suggested that, if expert testimony is uncontroverted, the court should direct a verdict on the issue rather than instruct the jury on the effect of the uncontroverted evidence. Mr. Carney reviewed the new California jury instructions on opinion testimony, which suggest that, where expert testimony is necessary to establish the standard of care, the jury must accept expert testimony on the standard of care unless the testimony is rebutted by other evidence. Mr. Humpherys suggested that the jury should be told that it can weigh expert testimony but that it should not guess at or come up with its own standard when expert testimony is required to establish the standard of care. The committee decided that it needs more research on the law governing expert testimony.

**Mr. Ferguson's subcommittee will rework the MUJI instruction (current 3.14) on expert opinion testimony.**

5. *Schedule.* The committee agreed not to meet during the month of July. The meeting scheduled for July 12, 2004, was cancelled.

6. *Next Meeting.* The next meeting will be Monday, June 14, 2004, at 4:00 p.m.

The meeting concluded at 6:00 p.m.

1 GENERAL INSTRUCTIONS

2  
3 REVISED MUJI 1.4  
4 EVIDENCE IN THE CASE

5  
6 “Evidence” is anything that tends to prove or disprove a disputed fact. It can be the  
7 testimony of a witness or documents or objects or photographs or stipulations or certain qualified  
8 opinions or any combination of these things.

9  
10 You must entirely disregard any evidence as to which I sustain an objection and any evidence  
11 I that order to be struck.

12  
13 Anything you may have seen or heard outside the courtroom is not evidence and you must  
14 entirely disregard it. Do not make any investigation about the facts in this case. Do not make  
15 any personal inspections, observations or experiments. Do not view locations involved in the  
16 case, things or articles not produced in court. Do not look things up on the Internet. Do not look  
17 for information in books, dictionaries or public or private records that are not produced in court.  
18 Do not let anyone else do any of these things for you.

19  
20 Do not consider anything you may have heard or read about this case in the media or by word  
21 of mouth or other out-of-court communication.

22  
23 You are to consider only the evidence in the case, but you are not expected to abandon your  
24 common sense. You are permitted to interpret the evidence in light of your experience.

25  
26  
27 NEW MUJI 1.9  
28 CREDIBILITY OF WITNESS TESTIMONY

29  
30 Testimony in this case will be given under oath. You are responsible to evaluate that  
31 testimony as to its believability. You may believe all or any part of the testimony of a witness.  
32 You may also believe one witness as against many witnesses or many as against one, in  
33 accordance with your honest convictions. In evaluating the testimony of a witness, you may  
34 want to consider the following:

35  
36 *Personal Interest.* Do you believe the accuracy of the testimony was affected one way or the  
37 other by any personal interest the witness has in the case?

38  
39 *Bias.* Do you believe the accuracy of the testimony was affected by any bias or prejudice?

40  
41 *Demeanor.* Is there anything about the witness’ appearance, conduct or actions that causes  
42 you to give more or less weight to the testimony given?

43  
44 *Consistency.* How does the testimony that is given tend to support or not support other  
45 believable evidence that is offered in the case?

1       *Knowledge.* Did the witness have a good opportunity to know what he or she is testifying  
2 about?

3  
4       *Memory.* Does the witness' memory appear to be reliable?

5  
6       *Reasonableness.* Is the testimony of the witness reasonable in light of human experience?

7  
8       The foregoing instructions are not intended to limit how you evaluate testimony. You are the  
9 ultimate judges of how it is to be interpreted.

10  
11       COMMENT: This instruction may be given again at the conclusion of the case.

12  
13  
14       REVISED MUJI 2.8  
15       ALL PARTIES EQUAL BEFORE THE LAW

16  
17       In this case the plaintiff is [identify entity] and the defendant is [identify entity]. This should  
18 make no difference to you. You must decide this case as if it were between individuals.

19  
20  
21       REVISED MUJI 2.10  
22       INCONSISTENT STATEMENTS

23  
24       You may believe that a witness, on another occasion, made a statement inconsistent with that  
25 witness's testimony given here. That doesn't mean that you are required to disregard the  
26 testimony. It is for you to decide whether to believe the witness.

27  
28  
29       REVISED MUJI 2.11  
30       EFFECT OF WILLFULLY FALSE TESTIMONY

31  
32       If you believe any witness has intentionally testified falsely about any important matter, you  
33 may disregard the entire testimony of that witness, or you may disregard only the intentionally  
34 false testimony.

35  
36  
37       NEGLIGENCE INSTRUCTIONS

38  
39       3.08 VIOLATION OF SAFETY LAW.

40  
41       Violation of a safety [statute/ordinance/rule] is evidence of negligence unless the violation is  
42 excused. The plaintiff claims that the defendant violated a safety [statute/ordinance/rule] that  
43 says:

44  
45       [summarize or quote the statute/ordinance/rule]

1 If you decide that the defendant violated the [statute/ordinance/rule], you must decide  
2 whether the violation is excused.

3  
4 The defendant claims the violation is excused because:

5  
6 1. Obeying the [statute/ordinance/rule] would have created an even greater risk of harm.

7  
8 2. [She/He/It] could not obey the [statute/ordinance/rule] because s/he faced an emergency  
9 that [She/He/It] did not create.

10  
11 3. [She/He/It] was unable to obey the [statute/ordinance/rule] despite a reasonable effort to  
12 do so.

13  
14 4. [She/He/It] was incapable of obeying the [statute/ordinance/rule].

15  
16 5. [She/He/It] was incapable of understanding what the [statute/ordinance/rule] required.

17  
18 If you decide that the defendant violated the [statute/ordinance/rule] and that the violation  
19 was not excused, you may consider the violation as evidence of negligence. If you decide that the  
20 defendant did not violate the [statute ordinance rule] or that the violation should be excused, you  
21 must disregard the violation and decide whether the defendant acted with reasonable care under  
22 the circumstances.

23  
24 References

25 Child v. Gonda, 972 P.2d 425 (Utah 1998)

26 Gaw v. State ex rel. Dep't of Transp., 798 P.2d 1130 (Utah Ct. App. 1990)

27 Jorgensen v. Issa, 739 P.2d 80 (Utah Ct. App. 1987)

28 Hall v. Warren, 692 P.2d 737 (Utah 1984)

29 Intermountain Farmers Ass'n v. Fitzgerald, 574 P.2d 1162 (Utah 1978)

30 Thompson v. Ford Motor Co., 16 Utah 2d 30; 395 P.2d 62 (1964)

31  
32 Comment

33 Before giving this instruction, the judge should decide whether the safety law applies. The  
34 safety law applies if:

35 1. Plaintiff belongs to a class of people that the law is intended to protect; and

36 2. The law is intended to protect against the type of harm that occurred as a result of the  
37 violation.

38 The judge should include the section on excused violations only if there is evidence to  
39 support an excuse and include only those grounds for which there is evidence.

40  
41  
42 3.09. "FAULT" DEFINED.

43 You must decide whether [names of persons on verdict form] were at fault. As used in these  
44 instructions and in the verdict form, the word "fault" has special meaning. Someone is at fault if:

45  
46 1. that person's conduct was [insert applicable causes of action];

1 and

2  
3 2. that person’s conduct was the legal cause of plaintiff’s harm.

4  
5 I will now explain what these terms mean.

6  
7 References

8 Utah Code Sections 78-27-37(2); 78-27-38; 78-27-40.  
9 Biswell v. Duncan, 742 P.2d 80, (Utah Ct. App. 1987).  
10 Haase v. Ashley Valley Medical Center, 2003 UT 360.  
11 Bishop v. GenTec, 2002 UT 36.

12  
13 Comment

14 “Fault” under the Comparative Negligence Act includes negligence, breach of warranty, and  
15 other breaches of duty. This instruction should be followed by those defining the specific duty  
16 (for example, negligence) and the instruction on legal cause.

17  
18  
19 3.10. “LEGAL CAUSE” DEFINED.

20  
21 If you decide that the conduct of a person named on the verdict form was [insert applicable  
22 cause of action], you must then decide whether that conduct was a legal cause of the plaintiff’s  
23 harm. For the conduct to be a legal cause of harm, you must decide that all of the following are  
24 true:

- 25  
26 1. there was a cause and effect relationship between the conduct and the harm;  
27  
28 2. the conduct played a substantial role in causing the harm; and  
29  
30 3. a reasonable person could foresee that harm could result from the conduct.

31  
32 There may be more than one legal cause of the same harm.

33  
34 References

35 MUJI 3.13, 3.14, and 3.15

36  
37 Comments

38 The term “proximate” cause should be avoided. While its meaning is readily understandable  
39 to lawyers, the lay juror may be unavoidably confused by the similarity of “proximate” to  
40 “approximate.”

41  
42 FJC NOTES ON PROXIMATE CAUSE INSTRUCTION:

43 Much of our 14 Jan 04 meeting was devoted to a discussion of this instruction. There was  
44 much disagreement over the need to include “foreseeability” as an element of proximate  
45 causation. We agreed that further research needs to be done– we absolutely need to go back and  
46 have a clear idea of how our courts have defined causation.

1 Our present MUJI has Alternatives A and B.

2 MUJI 3.13- PROXIMATE CAUSE (Alternate A) A proximate cause of an injury is that  
3 cause which, in natural and continuous sequence, produces the injury and without which the  
4 injury would not have occurred. A proximate cause is one which sets in operation the factors that  
5 accomplish the injury.

6 MUJI 3.14- PROXIMATE CAUSE (Alternate B) In addition to deciding whether the  
7 defendant was negligent, you must decide if that negligence was a “proximate cause” of the  
8 plaintiff’s injuries. To find “proximate cause,” you must first find a cause and effect relationship  
9 between the negligence and plaintiff’s injury. But cause and effect alone is not enough. For  
10 injuries to be proximately caused by negligence, two other factors must be present:

- 11 1. The negligence must have played a substantial role in causing the injuries; and
- 12 2. A reasonable person could foresee that injury could result from the negligent behavior.

13 The new “CACI” from California has a negligence instruction (#400) that says a plaintiff  
14 must prove negligence, that plaintiff was harmed, and that the negligence was a “substantial  
15 factor” in causing the harm. Then #430 states that “A substantial factor in causing harm is a  
16 factor that a reasonable person would consider to have contributed to the harm. It must be more  
17 than a remote or trivial factor. It does not have to be the only cause of the harm.”

### 18 19 20 3.11. COMPARATIVE FAULT.

21  
22 You must decide and record on the verdict form a percentage of fault<sup>1</sup> for the conduct of each  
23 party based on the gravity or seriousness of the conduct. The total fault must equal 100%.

24  
25 For your information, the plaintiff’s total recovery will be reduced by the percentage of fault  
26 that you attribute to the plaintiff. If you decide that the plaintiff’s fault is 50% or greater, the  
27 plaintiff will recover nothing. When you answer the questions on damages, do not reduce the  
28 award by the plaintiff’s percentage of fault. The judge will make that calculation later.

#### 29 References

- 30 Utah Code Sections 78-27-38; 78-27-40.
- 31 Biswell v. Duncan, 742 P.2d 80, (Utah Ct. App. 1987).
- 32 Haase v. Ashley Valley Medical Center, 2003 UT 360.
- 33 Bishop v. GenTec, 2002 UT 36.

#### 34 Comment

35  
36 The judge should ensure the verdict form is clear that fault should only be assessed as to  
37 those parties for whom the jury finds both breach of duty and causation.  
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<sup>1</sup> Question: With the addition of 3.09, fault includes both breach of duty and legal cause. Is the percentage the jurors are to decide based on “seriousness of the conduct”, level of breach or contribution to causation?